LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-453

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES,

Petitioner,

v.

E. T. KLASSEN,
POSTMASTER GENERAL OF THE UNITED STATES,
P. G. NASH, GENERAL COUNSEL OF THE
NATIONAL LABOR RELATIONS BOARD,
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MYER FELDMAN
FRED W. DROGULA
Ginsburg, Feldman and Bress
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorneys for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Other Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	16
Conclusion	38
Appendix A: Opinion of the U.S. Court of Appeals for the District of Columbia	39
Appendix B: Opinion of the U.S. District Court for the District of Columbia	50
Appendix C: Order Extending Time to File Petition For Writ of Certiorari	69
Appendix D: Statutory Provisions Involved	70

INDEX OF CITATIONS

Cases:	Page
Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940)	34,36
Aptheker v. Secretary of State, 378 U.S. 500 (1965)	36
Braxton v. Bd. of Public Instruction, D.C.Pa. 303 F.Supp. 542 (1970)	36
Council 19, Am. Federation of State, County and Municipal Employees, AFL-CIO v. N.L.R.B., D.C.Ill. 1968, 296 F.Supp. 1100	38
Greene v. McElroy, 360 U.S. 474 (1959)	36
In the Matter of U.S. Postal Service, 208 NLRB No. 144	15
Jenkins v. Averett, 424 F.2d 1228 (1970)	36
Manhattan/Bronx Union v. Gronowski, C.A.D.C., 350 F.2d 451 (1965)	30
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969).....	21
N.L.R.B. v. Jones & Laughlin Corp., 301 U.S. 1 (1937)	33,34,36

Cases:	Page
National Ass'n of Government Employees v. White, C.A.D.C., 418 F.2d 1126 (1969)	35
National Postal Union, et al. v. Blount, et al., D.C.D.C., 341 F.Supp. 370, affirmed in part, 409 U.S. 808 (1972) ..	11,12,32, 33,37
Solien v. U.S. Postal Service, C.A.D.C., No. 73-1264, appeal dismissed by consent, January 18, 1974	22,30
Southern California District Council v. Ordman, General Counsel of N.L.R.B., D.C. Cal. 1970, 218 F. Supp. 633....	38
Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958)	35
Terry v. State of Ohio, 392 U.S. 1 (1968)	36
United States v. Seeger, C.A. 2, 326 F.2d 846, affirmed, 380 U.S. 163 (1964)	35

Statutes:

National Labor Relations Act, 29 U.S.C. §§151, et seq.

Statutes: Page

Section 7 33
8(a)(2) 14,24
9(a) 21,23

Postal Reorganization Act of 1970,
Pub.L. 91-375, 84 Stat. 719,
39 U.S.C. §§ 101 et seq. (1970)

Section 10(a)[1201nt] 3-4, 10,11,15,16,18,
20,32,37
1202 4,10,13,17,20,24,31
1203 4,13,15,16,20,21,22
23,31,33,

Title 28, United States Code
Sections 2282 and 2284 11

Executive Orders:

E.O. 10988, 27 Fed.Reg. 551
(1962) 5,7,8,28,35
E.O. 11491, 34 Fed. Reg. 17605
(1969) 5

Congressional Record:

116 Cong. Rec. p. 14154-55 19,26
19849 27
19850-51 18,27
19852 27
20228 20,27
20232 23,27
20493 27
22055 27
22308-09 20,27
22310-11 20,27
22329 20,27
22330 27

Congressional Record: Page

116 Cong. Rec. p. 22331 27
22332 27
26954 18

H5591 (June 16,1970) .18
S10353-55
(June 29, 1970) 17,18,
28

Congressional Bills and Reports

H.R. 4, 91st Cong. 1st Sess.,
§ 3701 (1969) 9,10,
H.R. 17070, 91st Cong. 2d Sess.
§224(b)(1970) 9,17,19
H.R. Conf. Rep. No. 1363 on H.R.
17070, 91st Cong., 2d Sess.,
August 3, 1970, pp. 81-82 ..... 19, 27

S. 3842, 91st Cong., 2d Sess.
§1303(b) 9,17

Congressional Hearings

Hearings, House Committee on
Post Office and Civil Service
on H.R. 17070 (1970) 18

Miscellaneous:

Kennedy, The Postal Reorganization
Act of 1970: Heading Off Future
Postal Strikes? Georgetown Law
Journal, Vol. 59, No. 2, pp. 306-
307, 311, 312, 318 (1970) 8, 9, 18

IN THE

Supreme Court of the United States

October Term, 1975

No.

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES,
Petitioner,

v.

E. T. KLASSEN,
POSTMASTER GENERAL OF THE UNITED STATES,
P. G. NASH, GENERAL COUNSEL OF THE
NATIONAL LABOR RELATIONS BOARD,
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 9, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case is reported in 514 F.2d 189 (D.C. Cir. 1975) and is reproduced in Appendix A hereto, at 39. The opinion of the United States District Court for the District of Columbia is reported in 369 F. Supp. 747 (D.D.C. 1974) and is reproduced in Appendix B hereto, at 50 .

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered June 9, 1975.

The time for filing a petition for writ of certiorari in this case was extended to and including September 22, 1975, by Order No. A-213 signed by Mr. Justice Byron R. White on September 9, 1975. The Order is reproduced in Appendix C hereto, at 69 .

The jurisdiction of this Court is invoked pursuant to Section 1254, Title 28 of the United States Code.

QUESTIONS PRESENTED

This Petition raises important questions of federal law which have not been, but should be, settled by this Court, to wit:

1. Whether under the Postal Reorganization Act of 1970 the United States Postal Service can lawfully accord exclusive recognition to labor organizations to represent

600,000 postal workers in bargaining with their employer for wages, hours and working conditions, when those workers have not selected those organizations to represent them and have been denied the right to select bargaining agents of their own choosing.

2. Whether 600,000 postal workers, when for the first time granted by Congress the right to bargain collectively with their employer for wages, hours and working conditions, can be required to accept bargaining representatives appointed by the Congress and recognized by their employer.

3. Whether the Postal Reorganization Act of 1970, if construed to permit the exclusive recognition of labor organizations not selected by postal workers, unconstitutionally denies postal workers their fundamental right to bargain only through agents of their own choosing.

4. Whether petitioner's claims for relief are committed to the unreviewable discretion of the General Counsel of the National Labor Relations Board.

STATUTORY PROVISIONS INVOLVED

(1) Section 10(a) of the Postal Reorganization Act of 1970, 84 Stat. 784, 39 U.S.C. § 1201nt (1970), provides in pertinent part as follows:

> As soon as practicable after the enactment of this Act [Aug. 12, 1970], the Postmaster General and the labor organizations which as of the effec-

> tive date of this section hold national exclusive recognition rights granted by the Post Office Department, shall negotiate an agreement or agreements covering wages, hours, and working conditions of the employees represented by such labor organizations.* * *

(2) Sections of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 1202, 1203(a)(1970), provide in pertinent parts:

> [1202] The National Labor Relations Board shall decide in each case the unit appropriate for collective bargaining in the Postal Service.
>
> [1203(a)] The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

The full text of these and other pertinent statutory provisions are set forth in Appendix D hereto, at 70 .

STATEMENT OF THE CASE

A. Introduction

The Postal Reorganization Act ("PRA"), Pub. L. 91-375, 84 Stat. 719, 733, 39 U.S.C. § 101 et seq. (1970), which became effective on July 7, 1971, granted 600,000 postal

workers, for the first time, the right to select collective bargaining agents to bargain on their behalf with their employer--the U.S. Postal Service--for wages, hours and working conditions. Prior to this statute the terms and conditions of employment of postal workers, like those of other federal employees, were fixed by Congress; "collective bargaining" in government agencies was permitted only upon a narrow range of personnel practices pursuant to Exec. Order No. 10988, 27 Fed. Reg. 551, issued on January 19, 1962 (and its successor, Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969)).

To implement these new bargaining rights, Congress directed the National Labor Relations Board (the "Labor Board") to determine what employee "units" in the Postal Service are appropriate for collective bargaining, and to conduct elections in those units so that postal workers might vote to select bargaining representatives of their own choosing to represent them.

To allow the Labor Board time after passage of the PRA in which to perform its function, Congress created a two-year "transitional bargaining period." During this period--designed to "bridge the gap" between bargaining under the executive order system and full-fledged bargaining supervised by the Labor Board--Congress stipulated that certain bargaining units which the former Post Office Department had created under the executive order system should remain in effect, and appointed seven postal craft unions to represent postal workers for the two-year

transitional period. Congress thus deferred the postal workers' right to choose their bargaining agents for two years, expecting that the Labor Board would complete its assignment of establishing appropriate units within this transitional period so that elections could be held to fulfill the promised right of choice.

The gravamen of this petition is that four and one-half years after enactment of the PRA the promised elections have not been held--and none are projected in the foreseeable future. Despite the fact that the transitional period ended in July, 1973, the "appointed" craft unions continue to act as representatives of the 600,000 postal employees without elections or other form of selection on the part of employees. The Labor Board still has not determined appropriate bargaining units and the appointed craft unions claim a right "to hold over" until it does so. The employer--the Postal Service--on July 21, 1973, and again in July 21, 1975, went forward and signed new bargaining agreements with the appointed unions for a current term ending July 20, 1978, and claims a right to accord exclusive recognition to those craft unions during the term of the new contract. The Labor Board, having thus far failed to determine bargaining units, asserts that the appointed unions may hold over indefinitely as incumbent unions.

Petitioner is an independent "industrial" postal union composed primarily of black and other minority group postal workers which also represented postal workers under the executive order system. Congress provided in the PRA that petition-

er and other independent unions would have the right to compete with the Congressionally appointed craft unions for representation rights at the end of the transitional bargaining period. A detailed statement of the facts underlying this petition is set forth below.

B. Labor-Management Relations in the U.S. Postal Service Prior to the Postal Reorganization Act of 1970

Prior to the PRA the structure of collective bargaining in the Postal Service, and government employment generally, was established by executive order. E.O. 10988 for the first time established as executive policy the right of employees of the Federal Government to organize freely and assert their interests through labor unions that would have specified consultation rights and the right to sign agreements with agencies of the Executive Branch. Prior to Executive Order 10988, neither petitioner nor any other union held official recognition or the right to deal with the Post Office Department.

The pivotal element of this executive order was the method of making unit determinations. Each agency was directed to establish "appropriate units" within the broad guidelines of the Order, which could be established on any plant or installation, craft, functional or other basis.

Pursuant to E.O. 10988, the Post Office Department unilaterally published regulations establishing seven functional "craft" units, into which its employees were

designated to wit: Postal Clerks; Letter Carriers; Rural Letter Carriers; Mailhandlers; Motor Vehicle Operators; Special Delivery Messengers; and Maintenance Workers.

The Post Office Department's decision to designate craft units resulted in seven "craft" unions (hereafter "the Craft Unions") organized along the same seven functional craft lines, obtaining "national exclusive recognition rights" and the right to sign national agreements.

In representation elections held in the national craft units in 1962 and 1963, the seven Craft Unions were selected as bargaining agents in their respective national crafts. In the twelve years since that time there have been no elections in the Postal Service on a national basis wherein postal workers could choose bargaining agents.

The only issues appropriate for bargaining under E.O. 10988 were grievance matters and certain minor personnel matters. All issues involving wages, hours and working conditions were "non-negotiable", being determined exclusively by the Congress.

C. Background of the Postal Reorganization Act of 1970

The collective bargaining system permitted by the executive orders by common assent was inadequate. See, e.g., Kennedy, The Postal Reorganization Act of 1970: Heading Off Further Postal Strikes?, Georgetown Law Journal, Vol. 59, No. 2. pp. 306-307; 311-312, 318 (1970). Effective unionism was forestalled by the inability to

negotiate over the bread and butter issues of wages, hours and working conditions. In a real sense, the collective bargaining was a somewhat anemic parody of collective bargaining in the private sector. Not only was it restricted in scope, but labor management relations was a matter of executive grace.

As early as January, 1969, increasing dissatisfaction among postal employees caused the Administration to include labor-management relations provisions in postal reform legislation submitted to Congress. H.R. 4, 91st Cong., 1st Sess., Sec. 3701 (1969). Following a March 1970 strike by approximately 200,000 employees, however, the Post Office Department committed itself to sponsoring postal reform legislation that would take the Post Office "out of politics" and place responsibility for postal operations under the supervision of an independent government corporation. Kennedy, supra, p. 318. Support for this proposal by the seven "craft" unions was achieved by the Department by entering into an arrangement with those unions shortly after the termination of the March strike, undertaking to "freeze" the labor-management structure permanently into the craft mold, thus assuring them perpetual representation rights. S. 3842, 91st Cong. 2d Sess., §1303(b); H.R. 17070, 91st Cong. 2d Sess., §224(b) (1970).

The original bill put before Congress (drafted jointly by the Post Office Department and the Craft Unions) proposed collective bargaining between the union representatives of postal employees and management (the proposed postal corporation) and

provided for representation exclusively along national "craft" lines. H.R. 4, 91st Cong. 1st Sess., §3701 (1969). The net effect of these provisions would have been permanently to confer upon the Craft Unions, by Congressional appointment, the bargaining rights for all postal employees and would have precluded competition to those unions from rival unions. After considerable committee deliberations and debate, Congress refused to yoke postal labor relations in the new Postal Service with craft unionism and settled for a provision in Section 1202 of the PRA leaving unit determinations to be made by the Labor Board.

D. The Transitional Bargaining Period

Under Section 10(a) of the PRA, 39 U.S.C. 1201nt (1970), the seven Craft Unions were appointed, by Congress initially to represent Postal employees during a two-year transitional period which was created to provide time for the NLRB to make appropriate unit determinations and institute the permanent system. Petitioner and two other labor unions commenced an action in October, 1970, in the District Court for the District of Columbia, seeking to enjoin the enforcement of Section 10(a) on the grounds that, inter alia, Section 10(a) unconstitutionally (a) constituted invidious discrimination in appointing only the Craft Unions as bargaining agents for the transitional period, to the exclusion of Petitioner and other unions; (b) deprived all postal employees of their fundamental right to be represented by bargaining agents of their choosing; and (c) arbitrarily stipulated national craft unions for the transitional bargaining period, thus creating conflicts

of interest among postal employees arbitrarily gerrymandered into those units.

After substantial litigation, on March 15, 1972, a three-judge court, convened pursuant to 28 U.S. §§ 2282, 2284 (1970), upheld the constitutionality of the Section 10(a) because the acknowledged discrimination was only for a "temporary" two-year transitional period, created as a necessary expedient to provide for collective bargaining until the NLRB could act to establish the "permanent" bargaining system. National Postal Union v. Blount, 341 F. Supp. 370 (D.D.C.), affirmed in part, 409 U.S. 808 (1972). The Court stressed that at the conclusion of the transitional period all labor unions would have an opportunity to compete for representation rights "on an equal footing" and postal employees would have their opportunity to select bargaining agents of their own choosing.

During this two-year transitional period, the Craft Unions were recognized as the "exclusive" bargaining agents for postal workers and they enjoyed exclusive representation rights. On July 20, 1971, the Postmaster General and the Craft Unions proceeded to execute the two-year, transitional bargaining agreement called for by Section 10(a) of the PRA, which specified the wages, hours and working conditions of postal workers in the seven craft units.

During the pendency of the Blount litigation, petitioner and another independent union petitioned the Labor Board to hasten the establishment of "appropriate bargaining units" that would allow them to participate in elections and win accredited status as the duly selected bargaining representa-

tive of postal workers in certain units. Petitioner requested that the Labor Board establish a number of "industrial" units (consisting of all employees within designated plants, facilities or localities) instead of exclusive national craft units (consisting of employees performing a specified type of work). Petitioner maintained that the Labor Board had been mandated by the PRA to determine the appropriate bargaining units.

On July 20, 1973, when the transitional two-year period ended and the transitional agreement between the Craft Unions and the Postmaster General expired by its own terms, the Labor Board had not yet determined the appropriate units for the permanent bargaining system. Thus there were no bargaining units within which postal employees could select bargaining representatives and petitioner compete with the Craft Unions "on an equal footing" for such representation.

The expiration of the transitional bargaining period prior to the establishment of the permanent bargaining system by the NLRB produced an unexpected "hiatus" in the statutory scheme established by Congress in the PRA. Both Congress and the three-judge court in Blount contemplated that the Labor Board would establish permanent bargaining units and determine permanent bargaining representatives prior to the expiration of the transitional bargaining period.

D. Post-Transition Events and the Proceedings Below

Although the Labor Board did not establish the permanent bargaining units, the

Craft Unions, without elections or other form of mandate from postal employees, negotiated and executed a new two-year collective bargaining agreement with the Postmaster General commencing in August, 1973, to replace the transitional bargaining agreement. This agreement, purporting to determine wages, hours and working conditions for 600,000 employees, continued the exclusive recognition of the Craft Unions at least until July, 1975. Thereafter on July 21, 1975, the Craft Unions proceeded to execute a third agreement, again without any participation by postal employees, for a term ending July 20, 1978. The Craft Unions and the Postmaster General have stated that these new agreements, purportedly executed under the PRA, 39 U.S.C. §§ 1202, 1203 (1970), are "permanent" bargaining agreements and that the Craft Unions are now permanent bargaining representatives of all postal employees.

During the terms of the new agreements, the Postmaster General has at all times continued to accord exclusive recognition to the Craft Unions under the PRA, (1970), which provides in § 1203(a) that

> [t]he Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

No such selection was or could have been made because the Labor Board has to date failed to determine the "appropriate units" in which elections could take place.

Prior to the execution of the new agreement, in April, 1973, Petitioner filed a charge with the General Counsel of the Labor Board asserting that the actions of the Postmaster General in negotiating the new agreements, and particularly in continuing to accord exclusive recognition to the Craft Unions after the termination of the transitional bargaining period, would constitute an unfair labor practice under the provisions of Section 8(a)(2) of the National Labor Relations Act ("NLRA"). This charge was filed as a prelude to commencing an action in the district court to avoid the contentions that petitioner failed to exhaust its administrative remedies or to invoke the "primary" jurisdiction of the NLRB.

On November 12, 1973, the General Counsel of the NLRB declined to file a complaint against the Postmaster General, asserting that the Craft Unions can be "presumed" to be the legitimate, permanent bargaining representatives of 600,000 postal employees, even though no units have been determined and no elections have been held, because (a) of the elections that were held in 1962 under the former executive order system; (b) the Craft Unions maintained a representative status under the executive order system and during the transitional bargaining period; and (c) no challenge has been mounted to the Craft Unions' alleged "incumbency." The General Counsel did not indicate how a challenge could have been made since employees were required to accept Craft Union representation during the transitional bargaining period, and the NLRB has failed to determine, after two and one-half years, the

bargaining units that were the prerequisite for the elections.

Petitioner commenced the instant action in the district court on December 5, 1973, claiming, in the alternative, (a) that the actions of the Postmaster General in executing the new August, 1973, bargaining agreement and continuing to accord exclusive recognition to the Craft Unions beyond the transitional bargaining period was contrary to the PRA, 39 U.S.C. §§ 1201nt, 1203(a) (1970), and to the holding of the three-judge court in Blount, supra, or, in the alternative, (b) that these sections of the PRA, if now construed and applied by the Postmaster General to permit the execution of the August, 1973, agreement and the continued exclusive recognition of the Craft Unions for an open-ended period of time, unconstitutionally deny postal employees their right to select bargaining agents and further deny petitioner the right to compete with the Craft Unions for recognition. On January 22, 1974, the District Court granted summary judgment up on these claims for relief. The Court of Appeals affirmed the judgment of the District Court on June 9, 1975.

On February 5, 1974, during the pendency of the appeal to the Court of Appeals, the NLRB issued a Decision and Order upon Petitioner's 1971 request for unit determinations and representative elections. U. S. Postal Service, 208 NLRB No. 144. In essence, the NLRB dismissed the petitions on the ground that none sought elections in units that would be appropriate for bargaining in the Postal Service. Despite the statutory mandate, the NLRB did not deter-

mine what units are appropriate for bargaining and scheduled no elections. The NLRB currently is taking no further action upon this question.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE POSTMASTER GENERAL IS AUTHORIZED UNDER THE PRA TO ACCORD EXCLUSIVE RECOGNITION TO THE CRAFT UNIONS BEYOND THE TRANSITIONAL BARGAINING PERIOD.

Section 1203(a) PRA (39 U.S. §1203(a) (1970)) explicitly provides:

> The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

Section 10(a) of the PRA temporarily postponed the operation of this provision by creating a two-year "transitional bargaining period" during which the Craft Unions would be recognized as the bargaining agents for postal employees, but after which other unions could compete for recognition in elections which would afford employees their right of choice.

Petitioner argued below that the Postmaster General lacks the authority to accord exclusive recognition to the Craft Unions beyond the transitional bargaining period, and that Section 1203(a) of the PRA mandates that he accord exclusive recognition only to labor organizations that have

been lawfully "selected" by a majority of postal employees in appropriate bargaining units. The decision of the Court of Appeals in rejecting this contention threatens to produce the very results Congress most feared -- the perpetual confinement of postal workers within the ranks of national Craft Unions, without a right of choice, and the elimination of rival unions such as petitioner.

A. The Postmaster General's Authority Under Section 10(a) of the PRA to Grant Exclusive Recognition to the Craft Unions Expired with the Transitional Bargaining Period.

The original administration postal reform legislation would have permanently stipulated "national craft units," 1/ thus effectively eliminating any competition to the Craft Unions coming from petitioner and other independent postal unions. 2/ Congress rejected this arrangement, however, in favor of Section 1202 of the PRA (Appendix D hereto, at 70) which directs the Labor Board to determine the appropriate bargain-

1/ S. 3842, 91st Cong., 2d Sess., § 1303(b); H.R. 17070, 91st Cong. 2d Sess., § 224(b) (1970).

2/ Cong. Rec., P. S10353-55, June 29, 1970 (remarks of Senators Bellman, Goodell, Fong and McGee).

ing units. 3/ This was done expressly to insure the survival of independent unions 4/ and to insure that postal workers would be free from "any legislatively mandated membership or permanent confinement in seven national so-called Craft Unions . . .." Cong. Rec. P. S10353, June 29, 1970 (remarks of Sen. Bellman). 5/ As a senior member of the Post Office Committee was able to state during the debate on final passage in the House, the amended bill "insured that no employee organization would be put out of business because of the passage of this legislation." Cong. Rec., June 16, 1970, at H5591 (remarks of Congressman Hanley).

In Section 10(a) of the PRA, Congress provided that only during a two-year "transitional bargaining period" could the Craft Unions serve as the appointed bargain-

3/ "Thus the status quo would be maintained for at at least a year before the National Labor Relations Board would be required to make a series of decisions on appropriate units and national or local bargaining within the Postal System." (Emphasis supplied.) Kennedy, supra, at 331.

4/ Id. at 324.

5/ See also Hearings, House Committee on Post Office and Civil Service on H.R. 17070, at 32 (remarks of Mr. Hogan) (1970); 116 Cong. Rec. 19850 (remarks of Rep. Nix); 29937 (remarks of Sen. Goodell) (1970); 116 Cong. Rec. 26954 (remarks of Sen. McGee) (1970).

ing agents for postal employees, 6/ but that after this transitional period other unions would compete for recognition in free elections. 7/

6/ "The House bill provided that in each case the appropriate unit in the Postal Service for collective bargaining would be determined by the National Labor Relations Board and that such unit would receive exclusive recognition. The House bill further provided that, during the period of transition between date of enactment of the Postal Reorganization Act and commencement of the Postal Service, bargaining would be conducted by the Postmaster General and those labor organizations which, on the effective date of such Act, held national exclusive recognition . . . The conference substitute adopts the House provisions."

Conference Report No. 1363 on H.R. 17070, 91st Cong., 2d Sess., August 3, 1970, at 81-82.

7/ "During the transitional bargaining period this year . . . only those unions which have national exclusive recognition rights will be permitted to become bargaining agents for postal employees.

Let it be clear that it is the intent of this Congress, reflected in passage of the conference report on H.R. 17070, that nonnational and noncraft unions shall be able, after the transitional bargaining period, to compete for recognition as bargaining agents."

116 Cong. Rec. p. 14154-14155, August 25, 1970 (remarks of Sen. Goodell). (continued on next page)

The transitional bargaining period ended on July 20, 1973, with the expiration of the two-year transitional agreement. Upon that date the transitional mechanism provided in Section 10(a) lapsed, as did the Postmaster General's authority to grant exclusive recognition to the Craft Unions. Nevertheless, the Postmaster General has proceeded to execute two additional agreements with the Craft Unions and continues to accord them exclusive recognition.

Respondents assert that the new agreements were signed under Section 1202, the so-called "permanent" bargaining mechanism. But Section 1202 provides that the Labor Board, and not the Postmaster General, shall decide in each case the unit appropriate for collective bargaining in the Postal Service," a mandate which has not been performed.

B. Section 1203(a) of the PRA Authorizes the Postmaster General to Accord Exclusive Recognition Only To Labor Organizations That Have Been "Selected" By a Majority of the Postal Employees in an Appropriate Bargaining Unit.

(continued from previous page)
Congress specifically indicated its unwillingness to force postal workers into the ranks of the Craft Unions. See, 116 Cong. Rec. 20228 (remarks of Reps. Long and Olsen), 22308-09 (remarks of Sens. Javits, Goldwater, Curtis and Baker), 22310-11 (remarks of Sen. Fannin), and 22329 (remarks of Sens. Bellman and Goodell) (1970).

Section 1203(a) of the PRA permits the Postal Service to accord exclusive recognition to a labor organization only when it has been "selected by a majority of the employees in an appropriate unit as their representative." (Emphasis added.) Yet, since the expiration of the transitional period no union has been so "selected"; no elections have been conducted because the Labor Board has failed to make the unit determinations that are the prerequisite to any process of "selection."

The term "selected" specifically means chosen by "elections." NLRB v. Gissel Packing Co., 395 U.S. 575, 595-98 (1969). By way of a comparison, the term "designated" implies union recognition by means other than elections. Id. The terminology employed by Congress in Section 1203(a) must be compared with that of Section 9(a) of the NLRA, 29 U.S.C. § 159(a), which provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment ..." (Emphasis supplied.)

Congress carefully omitted the term "designated" from Section 1203(a) to pre-

vent the Craft Unions from "boot-strapping" themselves from their meager, antecedent status under the executive order system into full-fledged representational status under the permanent system--without ever affording postal workers an opportunity to express their will in the ballot box. 8 /

The Labor Board has acknowledged that the deletion of the term "designated" in Section 1203(a) of the PRA was intentional. In Solien v. United States Postal Service, App. No. 73-1264 (appeal dismissed by consent, January 18, 1974), the NLRB argued to the Court of Appeals in its brief:

> While the Postal Service correctly argued in the court below that according such a right would be a deviation from traditional Labor Act concepts, this would not be the only aspect of labor relations under the PRA that differs from provisions of the NLRA and Board case law thereunder. */ To legislate such differences is within the discretion of Congress, and Congress recognizes that the Postal Service, which is a quasi-governmental corporation and which had been governed by labor relations

8 / It is noteworthy that, even if Section 1203(a) were read to permit recognition to be accorded by "designation," the Craft Unions could not claim exclusive status because no process of "designation" has occurred.

> policies different from those of the NLRA, presented a sui generis situation. (At 33.)

And in the footnote to this paragraph, the Labor Board requested the Court to compare, among other provisions, Section 9(a) of the NLRA ("designated or selected") with Section 1203(a) of the PRA ("selected").

Petitioner urges this Court to review the court below's interpretation of Section 1203(a) which authorizes the continued, exclusive recognition of the Craft Unions beyond the expiration of the transitional period. Such an interpretation frustates the legislative purpose of Section 1203(a), best described by Representative William D. Ford:

> No one can represent a postal worker as a unit representative until a representation election has been held under the National Labor Relations Board guidance and guidelines and a determination has been made that the employees do in fact want a union in that unit, and which union they want to represent them. 116 Cong. Rec. 20232 (1970)

II. THE COURT OF APPEALS ERRED IN APPROVING THE LABOR BOARD'S CONTENTION THAT THE CRAFT UNIONS ARE ENTITLED TO EXCLUSIVE RECOGNITION AS "INCUMBENT" UNIONS BECAUSE OF THEIR PRIOR REPRESENTATION OF POSTAL WORKERS

In April 1973 petitioner filed a charge with the Labor Board, asserting that the Postal Service would commit an unfair labor practice under Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), in negotiating a new contract with the Craft Unions and in according them permanent exclusive recognition. 9/ Two months after the new contract was executed, on November 12, 1973, the General Counsel of the Labor Board declined to file a complaint against the Postal Service based upon petitioner's charge, asserting that even though no units have been determined and no elections have been held, the Craft Unions could be "presumed" to be the legitimate, permanent bargaining representatives of the 600,000 postal employees. The Labor Board relied on (a) the elections held under the former executive order system in 1962 and 1963, (b) the representational status held by the Craft Unions under the executive order system and during the transitional bargaining period, and (c) the fact that no challenge has been mounted to the Craft Unions' alleged incumbency. 10/

9/ This charge was filed with the Labor Board to avoid the contentions that petitioner failed to exhaust its administrative remedies or to invoke the primary jurisdiction of the Labor Board. Petitioner averred, however, that its claim arose under under the Constitution and provisions of the PRA, the construction and interpretations of which are not committed in the first instance to the Labor Board.

10/ How such a challenge could have been mounted was left unexplained, given the Board's failure to determine the appropriate units under the mandate of Section 1202 and the postal employees' lack of choice but to accept the Craft Unions' representation.

This ruling, affirmed by the Court of Appeals, conflicts with the express language of the PRA and with the unmistakably clear intent of Congress. Petitioner strongly urges that the Craft Unions can not be "presumed" to now be the unions preferred by postal workers by virtue of their former status. Such a presumption is diametrically opposed to Congress' overriding objective of assuring petitioner and other independent unions an opportunity to compete for recognition at the end of the transitional bargaining period.

> Let it be clear that it is not the intent of Congress to permit, in any contract negotiated by the new postal corporation during the transitional bargaining period, the inclusion of any provision which would have the effect of providing those unions which do now have national exclusive recognition rights with any advantage over those which do not, with the result of effectively freezing the latter unions out of the bargaining process indefinitely.
>
> It is the intent of Congress that bargaining during the transitional bargaining phase be conducted in such a way that upon conclusion of the transitional period non national and noncraft unions, such as the NPU and the NAPFE, will be able to compete for recognition as a bargaining agent for postal employees upon

> an equal footing with those national unions which have been permitted to bargain during that period. 116 Cong. Rec., pp. 14154-14155, August 25, 1970 (remarks of Sen. Goodell).

This Congressional purpose to deny the Craft Unions any "advantage" as a result of their temporary status during the transitional period, and to assure other unions the right to compete "on an equal footing," is irreconcilable with any "presumption" that the Craft Unions can now further be entrenched as "incumbent" unions. The Labor Board's decision to apply a presumption of incumbency, thereby solidifying the status of the Craft Unions, effectively nullifies the essential purpose for the legislative compromise which amended the original bill specifically to deny the Craft Unions indefinite status because of their prior representation under the executive order system. 11/ Senator Bellmon summarized the Congressional purpose as follows:

11/ See the following congressional statements criticizing attempts to legislate the independent unions out of existence, advocating that the postal employees enjoy the free choice to select their own representatives in Board-conducted elections, and favoring the preservation of the status quo so independent unions such as petitioner would have a fair opportunity to compete for the employees' support
(continued on next page)

Mr. President, the amendment is designed to free postal employees from any legislatively mandated membership and permanent confinement in seven national so-called craft unions by permitting the National Labor Relations Board to apply the normally accepted standards in determining what are the appropriate units--industrial, craft, or a combination thereof.

Examples of unions which would be put out of business under the language of the Senate bill as it presently exists are the National Alliance of Postal and Federal Employees and the National Postal Union, commonly known as the NPU,

---

(Continued from previous page)

until the Labor Board ordered such elections: 116 Cong. Rec. 19849 (remarks of Rep. Rosenthal), 19850-51 (remarks of Reps. Nix. and Hogan), 19852 (remarks of Rep. Hanley), 20228 (interchange between Reps. Long (Md.) and Olsen), 20232 (remarks of Rep. Wm. Ford), 20493 (remarks of Rep. Gilbert), 22055 (remarks of Sen. Javits) 22308-09 (remarks of Sens. Goldwater, Javits, Curtis, McGee, and Baker), 22310-11 (remarks of Sen. Fannin), 22329 (remarks of Sens. Bellman and Goodell), 22330 (remarks of Sens. McGee, Fong, Pastore, Goodell and Javits), 22331 (remarks of Sens. Goodell, Fong, and McGee), 22332 (remarks of Sens. McGee, Pastore, and Miller) (1970); H.R. Rep. No. 1363, 91st Cong., 2d Sess. (1970).

> with a combined membership of approximately 125,000 postal and Federal Employees.
>
> Mr. President, collective bargaining, which is provided for in the proposed legislation, is a sham if the employees are denied the right to freely select their bargaining representatives. (Emphasis supplied.) Cong. Rec. p. S10353, June 29, 1970.

The application of the "incumbency" rule cannot be squared with this manifest intent. In affirming the Labor Board's decision, the Court of Appeals granted the Craft Unions a status which Congress specifically refused to grant.

A. The 1963 Representation Elections Conducted Under the Former Executive Order System Do Not Entitle The Craft Unions To Exclusive Recognition Today.

The last elections for national bargaining representatives, conducted by the Post Office Department under Executive Order 10988, occurred in 1962 and 1963. Collective bargaining under the executive order system was vastly different from the bargaining now permitted under the PRA, for the bread and butter issues of wages, hours and working conditions were "nonnegotiable." Bargaining was permitted only on certain personnel practices. The principal union function was the processing of grievances on behalf of employees, a function which all unions could perform regardless of their majority or minority status. True postal unionism was inhibited

and stulified by the inability of unions to represent workers effectively and, therefore,union membership was of dubious utility.

Against this history, the Labor Board may not properly confer "incumbent" union status upon the Craft Unions based upon the twelve years old elections in a totally different system of labor-management relations. Moreover, many of the 600,000 postal workers employed since 1963 did not participate in the former elections, and, of course, have participated in none since.

Apart from these considerations, Congress expressly abolished the executive order system in favor of the new system established by the PRA, and expressly declared that the status of the Craft Unions under the former system would not afford them a preferred status beyond the transitional bargaining period. Congress took great pains to assure (pages 25-28, supra) that the craft unions would not be permitted to bootstrap themselves from their meager,antecedent status to exclusive representation rights under the new system. The Labor Board itself has agreed in the past that "incumbency" is inopposite to the legislative intent underlying the PRA.

> [T]he legislative history of [the PRA] is replete with Congressional opposition to proposals that would compel continued exclusive recognition of the national craft unions [after the transitional period] or would allow the Postal Service and the

> 'national exclusive' representatives to negotiate any 'union security' clause which might force the employees to be members of the national craft unions. Brief for Labor Board in Solien v. United States Postal Service, supra, at 27. (Emphasis supplied.)

B. The 1963 Elections Are Not Legitimate Substitutes for Elections Conducted Today Pursuant to The PRA.

In the 1962 and 1963 elections, postal employees exercised only a very limited "privilege" conferred upon them by executive grace. 12/ They did not select representatives to bargain with management for wages, hours and working conditions, but rather to process grievances and to "consult" with management on employee practices.

The PRA--for the first time--vested postal workers with the right to select agents to bargain with the U.S. Postal Service on all economic issues. Because of the new and vastly expanded range of economic and other issues open to bargaining, it cannot reasonable be contended that the 1962 and 1963 elections are legitimate substitutes to elections held today. Congress, fully cognizant of these former elections, saw fit to mandate new elections at the end of the transitional bargaining period. This mandate cannot be

12/ Manhattan/Bronx Postal Union v. Gronowski, 350 F. 2d 451 (D.C. Cir. 1965).

squared with the Court of Appeals decision permitting the Craft Unions to achieve by an administrative ruling a preferred status contrary to basic decision of the PRA.

C. The Craft Unions Are Not Entitled to Recognition As "Incumbent" Unions Because of Their Representational Status During the Transitional Bargaining Period

The Labor Board's application of its "incumbency" rule was based partially on alleged employee "acceptance" of the Craft Unions during the transitional bargaining period. But postal employees had absolutely no choice in the matter -- the Craft Unions were appointed by a legislative fiat and no action on the part of the employees could have dislodged them during this period.

Moreover, there is no way in which postal workers could have challenged the incumbency of the Craft Unions (since the transitional period ended in July 1973) because the Labor Board had failed to fulfill its mandate under Section 1202 of the PRA and to establish the basic bargaining units that are essential to elections.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT 1203(a) OF THE PRA, AS APPLIED TO PERMIT THE PMG TO ACCORD EXCLUSIVE RECOGNITION TO THE CRAFT UNIONS BEYOND THE

TRANSITIONAL PERIOD, DOES NOT UNCONSTITUTIONALLY DENY POSTAL WORKERS THEIR RIGHT TO CHOOSE THEIR OWN BARGAINING AGENTS.

In National Postal Union v. Blount, supra, the Court upheld the constitutionality of Section 10(a) of the PRA against the challenge that the arbitrary appointment of the Craft Unions for the duration of the transitional period deprived postal employees of their fundamental right to be represented by bargaining agents of their own choosing. Noting that Section 10(a) was "open to criticism," the Court reasoned, that it did not amount to discriminatory "class legislation" because:

> [i]n substance our position is that when Congress thus guaranteed for the first time to the postal employees a statutory right of freedom of choice of representatives for purposes of collective bargaining, it was not an invidious discrimination during the transitional period to accord the right to exclusive representation to the defendant unions.

The Blount Court construed the PRA to allow the seven Craft Unions to enjoy exclusive recognition rights under Section 10(a) only during the transitional bargaining period, and held that, at the end of the transitional period, postal employees would be entitled to exercise their right to select bargaining representatives and that postal

unions then would have the right to compete for such representation. The decision of the Court of Appeals permits a continuation of the discrimination found in Blount beyond the transitional period and will permanently deprive postal workers of their right of choice and exclude minority unions. Petitioner respectfully urges the Court to review the decision of the Court below regarding the constitutionality of Section 1203(a) of the PRA as so applied.

Employees have a fundamental, and not merely statutory, right to choose their bargaining agents. In N.L.R.B. v. Jones & Laughlin Corp., 301 U.S. 1, 33 (1937), the Court construed Section 157 of the NLRA, which provides that employees shall have the right "to bargain collectively through representatives of their own choosing."

The Court stated:

> [I]n its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

> That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. (Emphasis supplied.)

And in Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 263 (1940), the Court used even more explicit language in interpreting the same provision:

> Neither this provision, nor any other provision of the Act, can properly be said to have 'created' the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 33, 34, 57 S.Ct. 615, 662, 81 L.Ed. 893, 108 A.L.R. 1352, we observed that this right is a fundamental one; that employees 'have as clear a right to organize and select their representatives for lawful purposes' as the employer has 'to organize its business and select its own officers and agents . . . .' (Emphasis supplied.)

The fact that Congress had no obligation to grant postal workers the right to bargain collectively for wages and hours does not militate in any way against the existence of a constitutional right to select bargaining agents once the statutory right to bargain collectively has been given. "[The] legislative power to deny a particular privilege on unconstitutional grounds." United States v. Seeger, 326 F.2d 846, 851 (2d Cir.) affirmed, 380 U.S. 163 (1964); Speiser v. Randall, 357 U.S. 513 (1958). 13/

13/ This principle was restated recently by Judge Leventhal in National Ass'n of Government Employees v. White, 418 F.2d 1126 (D.C. Cir. 1969):

> We recognize that the federal government employee's right to organize is set forth in Executive Order 10988, and that implementation of this directive is essentially a matter of executive determination. But even where a privilege that has been extended is capable of unilateral revocation, the administration of that privilege cannot be exercised in a manner which clashes with basic constitutional safe-guards. Judicial relief is available even when the privilege is not rooted in a statute. [Footnotes omitted.] (At p. 1130)

The constitutional right of employees to choose their own bargaining agents is no less worthy of protection because it classically does not fall within the mold of infringements upon speech, religion or assembly. The First Amendment embraces innumerable personal and fundamental rights that do not fall squarely with these three categories. 14/ As the Court held in N.L.R.B. v. Jones, supra, and Amalgamated Utilities Workers v. Consolidated Edison Co., supra, the right of employees to speak to management through bargaining agents they alone select is unquestionably such "a fundamental right." Accordingly, if the PRA is applied to yoke postal workers with bargaining agents appointed by Congress and chosen by their employer, without any process of selection, it denies them this constitutionally protected right.

14/ See, e.g. Terry v. State of Ohio, 392 U.S. 1 (1968) (freedom from unlawful restraint and security of person); Aptheker v. Secretary of State, 378 U.S. 500 (1965) the right to travel); Greene v. McElroy, 360 U.S. 474 (1959)(right to hold property); Jenkins v. Averett, 424 F.2d 1228 (4th Cir., 1970)(freedom from unreasonable interference by police officers); Braxton v. Bd. of Public Instruction, 303 F. Supp. 542 (D.C. Pa. 1970) (right of a teacher to wear a beard).

IV. PETITIONERS' CLAIMS ARE NOT COMMITTED TO THE UNREVIEWABLE DISCRETION OF THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD.

The Court of Appeals erred in deciding that petitioner's claims for relief, involving issues of statutory construction, are committed to the sole discretion of the Labor Board's General Counsel.

The central issue of the Craft Unions' ability to maintain their exclusive status beyond the transitional period depends upon the construction of Section 10(a) of the PRA and whether the assignment of incumbent union status to the Craft Unions can be squared with the intent of Congress. In National Postal Union v. Blount, supra, at 373, the Court held that the courts -- and not the Labor Board -- have the jurisdiction and authority to resolve this and related issues arising under Section 10(a). Further, petitioner's action below was a proceeding against the Postmaster General seeking declaration and injunctive relief.

Where questions of statutory construction are involved -- as opposed to finding of facts or making expert judgments on labor policies -- courts will review refusals to issue unfair labor practice complaints.

Southern California District Council v. Ordman, General Counsel of N.L.R.B., D.C.Cal. 1970, 318 F.Supp. 633. Constitutional issues, of course, are always subject to judicial review. Council 19, Am. Federation of State, County and Municipal Employees, AFL-CIO v. N.L.R.B., 296 F. Supp. 1100 (D.C. Ill. 1968).

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

GINSBURG, FELDMAN & BRESS

MYER FELDMAN
FRED W. DROGULA
1700 Pennsylvania Ave.,N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES et al., Appellants,

v.

E. T. KLASSEN, Individually and as Postmaster General of the United States, et al.

No. 74-1384.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 26, 1975.

Decided June 9, 1975.

A postal labor union and individual postal workers brought suit against the Postmaster General of the United States and general counsel of the National Labor Relations Board to enjoin operation and enforcement of the Postal Reorganization Act of 1970. The United States District Court for the District of Columbia, 369 F.Supp. 747, Charles R. Richey, J., denied plaintiffs' application for the convening of a three-judge court, partially granted defendants' motion for summary judgment with respect to plaintiffs' constitutional claim that they were denied equal protection of the law by certain provisions of the Act, and dismissed, for lack of jurisdiction, plaintiffs' claim that Postmaster General, by granting exclusive recognition to certain craft unions, committed an unfair labor practice. On appeal the Court of Appeals, Miller, J., upheld the trial court's rulings.

Affirmed.

1. Labor Relations ⇐204

"Transitional period" provided for in Postal Reorganization Act, during which national craft unions would be exclusively recognized as representatives of postal employees, was not intended by Congress to be limited to period of two years, but was to extend to National Labor Relations Board's establishment of bargaining units and elections of representatives or until accomplishment of such earlier action as might be taken by Board defining rights and obligations of Postmaster General, labor organizations representing postal employees, and their members. 39 U.S.C.A. §§ 1201 note, 1203(a).

2. Labor Relations ⇐204

Section of Postal Reorganization Act providing that National Labor Relations

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Board would decide in each case the unit appropriate for collective bargaining in postal service was not enacted to insure that independent unions could survive to compete with craft unions for recognition upon equal footing; rather, nonnational or noncraft unions found by NLRB not to be "appropriate" will not be able to compete for recognition under Act. 39 U.S.C.A. § 1202.

3. Courts ⇐101.5(5)

District Court did not err in denying application of postal employees and labor union to convene three-judge court to consider validity of transitional bargaining mechanism established by Postal Reorganization Act. 28 U.S.C.A. §§ 2282, 2284; 39 U.S.C.A. §§ 101 et seq., 201, 1201 et seq., 1201 note, 1202, 1203(a), 1209; National Labor Relations Act, §§ 8(a)(2, 5), 9(a), 29 U.S.C.A. §§ 158(a)(2, 5), 159(a, b); Executive Order No. 11491, 5 U.S.C.A. § 7301 note; U.S.C.A.Const. Amend. 5.

4. Constitutional Law ⇐238(2)

Postal employees and their labor union were not denied equal protection of law by action of Postmaster General in continuing to accord exclusive representation to national craft unions beyond expiration of transitional bargaining period provided for in the Postal Reorganization Act. 39 U.S.C.A. §§ 1201 note, 1203(a), (c)(1)(B); U.S.C.A.Const. Amend. 5.

5. Labor Relations ⇐517, 676

General counsel of National Labor Relations Board has unreviewable discretion to refuse to issue unfair labor practice complaint. National Labor Relations Act, § 8(a)(2), 29 U.S.C.A. § 158(a)(2).

6. Labor Relations ⇐510

District Court was without jurisdiction to consider whether Postmaster General committed unfair labor practice by continuing to accord recognition to national craft unions signatory to transitional bargaining agreement, since that question directly involved general counsel's final, nonreviewable statutory authority over investigation and issuance of unfair labor practice complaints. National Labor Relations Act, § 8(a)(2), 29 U.S.C.A. § 158(a)(2); 5 U.S.C.A. § 701 et seq.

Appeal from the United States District Court for the District of Columbia (D.C.Civil Action 2143–73).

Fred W. Drogula, Washington, D. C., for appellants.

Harry R. Silver, Atty., Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen., New York City, Earl J. Silbert, U. S. Atty., Stephen F. Eilperin, Atty., Dept. of Justice and Stephen E. Alpern, Atty., U. S. Postal Service, were on the brief for appellee Klassen.

Peter Carre, Atty., N. L. R. B., for appellee Nash. John S. Irving, Deputy Gen. Counsel, N. L. R. B., Patrick Hardin, Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, Abigail Cooley, Asst. Gen. Counsel for Sp. Litigation and Alan Banov, Atty., N. L. R. B., were on the brief for appellee Nash.

Mozart G. Ratner, and Bernard Ries, Washington, D. C., were on the brief for appellee, National Association of Letter Carriers AFL–CIO.

Before WRIGHT and TAMM, Circuit Judges, and JACK R. MILLER,* Judge.

* Sitting by designation pursuant to 28 U.S.C. § 293(a).

United States Court of Customs and Patent Appeals.

Opinion for the Court filed by Judge Miller.

MILLER, Judge:

This is an appeal from the judgment of the district court, 369 F.Supp. 747 (1974): (1) denying plaintiff-appellants' application for the convening of a three-judge court; (2) partially granting[1] defendant-appellees' motion for summary judgment with respect to plaintiff-appellants' constitutional claim that they were denied equal protection of the law by sections 10(a), 1202, and 1203 of the Postal Reorganization Act (PRA) as construed by the Postmaster General (PMG); (3) dismissing with prejudice, for lack of jurisdiction, plaintiff-appellants' claim that the PMG, by granting exclusive recognition to certain craft unions pursuant to Chapter 12 of the PRA, committed an unfair labor practice under section 8(a)(2) of the National Labor Relations Act (NLRA); and (4) dismissing, for lack of jurisdiction, plaintiff-appellants' claim that the PMG, by negotiating new collective bargaining agreements with said craft unions during pendency of representation petitions before the National Labor Relations Board (NLRB), committed an unfair labor practice under section 8(a)(2) of the NLRA (but without prejudice to renew said claim at an appropriate future time in the proper forum). We affirm.

BACKGROUND OF THE CASE

Appellants are an independent industrial labor organization of employees (National Alliance) and three Postal Service employees who are members thereof. Appellees are the Postmaster General, the General Counsel of the NLRB (GCNLRB), and the National Association of Letter Carriers (NALC), which was an intervenor in the proceedings below.

On August 12, 1970, the Congress enacted the Postal Reorganization Act (39 U.S.C. § 101 et seq.), creating the United States Postal Service "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. Section 1209 of the PRA (39 U.S.C. § 1209) granted Postal Service employees collective bargaining rights and, with minor exceptions, subjected the Postal Service to the terms of the NLRA.[2] Section 10(a) of the PRA

1. The court said that it would be premature to review allegedly objectionable administrative action which had not yet been ruled upon by the agency with primary jurisdiction to pass thereon, namely the National Labor Relations Board.

2. Prior to the effective date of the PRA on July 1, 1971, collective bargaining between the Post Office Department and labor unions representing postal employees was governed by Exec. Order No. 10988, 27 Fed.Reg. 551 (1962). Section 6(a) thereof accorded "exclusive recognition" to a labor organization designated or selected by a majority of the employees in each unit. Without contravention by appellants, appellee GCNLRB relates as follows: Elections were held in 1962 and 1963 to determine the national exclusive representatives for employees in the Post Office Department. A majority of the employees voting in seven national craft units selected seven national craft unions, including appellee NALC, which the Department of Labor certified as national exclusive representatives for postal employees in those units. Thereafter, the Post Office Department and the seven craft unions entered into successive collective bargaining agreements, including one effective from March 9, 1968, to March 8, 1970, which was extended on a day-to-day basis until it was succeeded by a 1971 national agreement. Under Exec. Order No. 10988 and its successor, Exec. Order No. 11491, 34 Fed.Reg. 17605 (1969), National Alliance held national "formal" recognition under which it had authority to meet and consult with the agency on matters of personnel policy.

(84 Stat. 784), referred to as the "transitional section," provided:

> As soon as practicable after the enactment of this Act, the Postmaster General and the labor organizations which as of the effective date of this section hold national exclusive recognition rights granted by the Post Office Department, shall negotiate an agreement or agreements covering wages, hours, and working conditions of the employees represented by such labor organizations. . . .

Pursuant to this section, the PMG and the national craft unions (including appellee NALC) holding national exclusive recognition status granted by the Post Office Department entered into a national agreement on July 20, 1971, for a two-year period during which those unions were recognized as the exclusive bargaining agents for postal workers with exclusive representation rights.

The NLRB assumed jurisdiction over labor relations in the Postal Service on July 1, 1971, the effective date of the PRA. At the same time, sections 1202 and 1203 of the PRA (39 U.S.C. §§ 1202, 1203), which are particularly involved in this appeal, became operative. In pertinent part, these provide:

> *§ 1202. Bargaining units*
>
> The National Labor Relations Board shall decide in each case the unit appropriate for collective bargaining in the Postal Service. . . .
>
> *§ 1203. Recognition of labor organizations*
>
> (a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.
>
> . . . . .
>
> (c) When a petition has been filed, in accordance with such regulations as may be prescribed by the National Labor Relations Board—
>
> (1) by an employee, a group of employees, or any labor organization acting in their behalf, alleging that (A) a substantial number of employees wish to be represented for collective bargaining by a labor organization and that the Postal Service declines to recognize such labor organization as the representative; or (B) the labor organization which has been certified or is being currently recognized by the Postal Service as the bargaining representative is no longer a representative
>
> . . . .
>
> the National Labor Relations Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation exists, shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the National Labor Relations Board, who shall not make any recommendations with respect thereto. If the National Labor Relations Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Nearly two years later, as the expiration date of the July 20, 1971, national agreement was approaching, there had been no decision by the NLRB under section 1202. Accordingly, the Postal Service and the national craft unions commenced negotiations, and a new two-year national agreement was reached

running from July 21, 1973, to July 21, 1975.

Meanwhile, in October of 1970, shortly after enactment of the PRA, National Alliance and two other unions brought an action in district court to enjoin enforcement of section 10(a), the "transitional section" quoted above. They complained that it was "class" or "special" legislation which denied them and their members equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. A three-judge court was convened which, on March 15, 1972, upheld the constitutionality of the PRA. National Postal Union v. Blount, 341 F.Supp. 370 (D.D.C.), aff'd mem. sub nom., National Association of Letter Carriers, AFL–CIO v. National Alliance of Postal & Federal Employees, 409 U.S. 808, 93 S.Ct. 67, 34 L.Ed.2d 69 (1972).

The court held that the transitional bargaining mechanism established by section 10 was not invidious discrimination and declined to grant plaintiffs the right to participate in negotiations prescribed by section 10 and to process grievances of its members, except as they might be entitled to do so under section 9(a) of the NLRA (29 U.S.C. § 159(a)).[3] The court said (341 F.Supp. at 373):

> In the aftermath of a very serious postal workers strike, Congress built into the Act a transitional bargaining mechanism designed smoothly to incorporate with some modification the status quo in labor representation among the postal employees. While this may be open to criticism as an inaccurate reflection of the appropriate bargaining units, resolution of that question is reserved by the Act to the National Labor Relations Board.

However, the court ordered that National Alliance be granted reasonable opportunity, commensurate with that accorded the craft unions, to address new employees to seek new members during the transitional period to afford it "a fair opportunity in this manner to seek to maintain a healthy life during the transitional period, enabling it more fully to compete for ultimate recognition as exclusive representative in *appropriate* units before the National Labor Relations Board in future proceedings authorized or required by the Act." (341 F.Supp. at 373, emphasis supplied.)

In 1971, while the three-judge court was considering the *Blount* case, several National Alliance locals filed representation petitions with the NLRB seeking elections in various proposed units of employees. On February 4, 1972, the NLRB ordered hearings in its Manhattan Regional Office.[4] Following the hearings, the cases were transferred to the NLRB, where oral argument was heard September 10, 1973. On February 5, 1974, shortly after the district court's judgment was entered from which this appeal was taken, the NLRB dismissed the petitions after finding that none of the petitioners sought elections in units that would be "appropriate" for bargain-

3. Section 9(a) provides that representatives designated for purposes of collective bargaining by the majority of the employees in a unit "appropriate" for such purposes shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining. Section 9(b) provides that the NLRB shall decide in each case whether the unit "appropriate" for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

4. National Alliance requested that the NLRB establish a number of "industrial" units (i. e., all employees in designated plants, facilities, or localities) in lieu of craft units (i. e., all employees performing a specific type work).

POOR COPY

ing in the Postal Service. United States Postal Service, 208 NLRB No. 144, 85 LRRM 1212 (1974). Pointing out that the legislative history of the PRA "instructs" the NLRB to apply its private sector criteria, it analyzed the Postal Service organization to determine "what lines of division may be most useful to the parties in furthering their collective-bargaining relationships." It said (*id.* at ——, 85 LRRM at 1217):

> The Employer's size, collective-bargaining history, number of employees, geographic dispersion, and centralized operational organization impose certain practical limitations on the numerical proliferation of bargaining units. It is obvious that meaningful collective bargaining could not realistically occur at each of the Employer's 32,000 individual facilities.[16] On the other hand, we are aware that certain broad horizontal or vertical divisions of employees into homogeneous units with the requisite community of interests might well promote meaningful, or at least feasible, collective bargaining.

The footnote stated that if each of t intervenors (the national craft unio could represent their crafts on a sing facility basis, the number of potent units would exceed 100,000.[5]

During the "open" period, sixty ninety days before expiration of the 19 national agreement in July of 19 locals of the National Alliance filed so twenty-eight additional representati petitions with various regional offices the NLRB, seeking elections among e ployees in various local units.[6] Proce ing of these petitions was deferred Regional Directors pending the NLR determination on the 1971 petitio They were dismissed following t NLRB decision of February 5, 1974.

When the Postal Service and the n tional craft unions executed the 1973 n tional agreement, National Alliance fil unfair labor practice charges in t NLRB's Baltimore Regional Office all ing that the Postal Service violated s tions 8(a)(2) and (5) of the NLRA U.S.C. § 158(a)(2), (5))[7] by: (1) negoti ing and executing said agreement duri

5. National Alliance argues that the NLRB did not determine what units are appropriate for bargaining. However, we do not read section 1202 of the PRA as mandating the NLRB to make such a determination before representation petitions are filed. We note that the NLRB did suggest alternative appropriate units for bargaining and elections in the Postal Service:

> [A] unit encompassing all employees within a region, metropolitan center, metropolitan area, or district might constitute an appropriate unit . . . [but] any less-than-nationwide unit which does not at least encompass all employees within a district or sectional center is too fragmented for meaningful collective bargaining. Accordingly, we shall dismiss any petition which fails to meet this initial standard.
>
> . . . However, our decision herein is not to be construed as an administrative fiat to adhere to the preexisting national cr units which Congress, under the PRA, c tinued during the transition period or as p cluding a finding of unit appropriateness a unit less than national in scope.

United States Postal Service, supra at ——, LRRM at 1217.

6. According to appellee GCNLRB, some p tions sought elections for single post offic and others sought elections among employ in various cities or metropolitan areas.

7. "(a) It shall be an unfair labor practice an employer—

> (2) to dominate or interfere with the for ation or administration of any labor orga zation . . . ;
>
> (5) to refuse to bargain collectively w the representatives of his employ . . . ."

the pendency of a question concerning representation raised by the 1971 and 1973 petitions; and (2) entering into another agreement with the national craft unions, contrary to sections 1202 and 1203 of the PRA, when they had not been elected by employees in NLRB conducted elections. On October 2, 1973, the Regional Director dismissed the charges except for the one concerning action of the Postal Service during pendency of the petitions. This was held in abeyance awaiting the NLRB's action on the 1971 and 1973 petitions.[8] National Alliance appealed the partial dismissal. On November 12, 1973, the Office of Appeals of GCNLRB upheld the Regional Director's action. On December 5, 1973, appellants filed the instant action in district court.

OPINION

Denial of Appellants' Application to Convene Three-Judge Court

The district court denied appellants' application, based on 28 U.S.C. §§ 2282, 2284, for the convening of the three-judge court which decided the *Blount* case. It concluded that the allegations in the complaint were, in essence, aimed at administrative action on the part of the PMG and inaction on the part of GCNLRB; that a three-judge court need not be convened for such purpose, citing William Jameson & Co. v. Morgenthau, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) and Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 113–116 (2d Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966); and that a three-judge court should not be convened where the constitutional attack on the statute as applied is insubstantial, citing Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 78 L.Ed. 152 (1933).

[1] Appellants urge that the constitutionality of sections 10(a) and 1203(a) must be reexamined because the exclusive recognition of the national craft unions which the court upheld in *Blount* was for a "transitional period" of "merely two years," whereas, in fact, this recognition has extended beyond that "transitional period." They state:

> Appellant believes that had the *Blount* court been apprised of the contention that the right of postal workers to select bargaining agents of their own choosing was deleted—not for merely two years, but indefinitely—the Court would have held that the discrimination it found in the statute was unreasonable and invidious.

However, we believe that appellants misapprehend both the opinion in *Blount* and the Congressional design specifically set forth in the PRA. The *Blount* court provided this definition of "transitional period" (341 F.Supp. at 372 n. 4):

> The transitional period referred to includes the period of one year from enactment of the Act during which the reorganization of the postal service would occur . . . . The transitional period should also be considered, insofar as the collective bargaining provisions of the Act are concerned, to be the period prior to the establishment of bargaining units and elections of representatives under the provisions of the National Labor Relations Act, as provided in Chapter 12 of the [PRA], or such earlier action as might

8. Following dismissal of the 1971 and 1973 petitions, the Acting Regional Director, on June 28, 1974, dismissed this charge. There was no appeal. This was the charge which the district court had left open in its January 22, 1974, order of dismissal without prejudice to renew at an appropriate future time in the proper forum.

be taken by the Labor Board defining rights and obligations of the Postmaster General, the labor organizations representing postal employees, and their members.

Thus, the court, as did the Congress in Chapter 12 of the PRA, pointed to the provisions of the NLRA for establishment of bargaining units and elections of representatives. The "transitional period" upheld by the court was to extend to the Board's establishment of bargaining units and elections of representatives, or such earlier action as might be taken by the Board defining rights and obligations of the Postmaster General, the labor organizations representing postal employees, and their members.

The National Alliance, by the petitions filed in 1971 and 1973, properly followed the procedure provided by the NLRA in the hope that the NLRB would decide that the units it contended for were "appropriate" and would order elections in those units. Had the NLRB decided these petitions favorably, counsel for appellants indicated (at oral argument) this appeal probably would not have been filed. However, the decisions were unfavorable, and Congress has provided no appeal from those decisions. As this court has said:

> [T]he question of an appropriate bargaining unit falls within "the wide area of determinations which depend on the Board's expertise and discretion" . . . . What factors the Board considered and what weight it accorded to them are questions which may only be raised in a judicial review proceeding under § 10 [29 U.S.C. § 160].[9]

International Ass'n of Tool Craftsmen v. Leedom, 107 U.S.App.D.C. 268, 270, 276 F.2d 514, 516, cert. denied, 364 U.S. 815, 81 S.Ct. 45, 5 L.Ed.2d 46 (1960).

[2] Appellants contend that section 1202 of the PRA was enacted to insure that independent unions could survive to compete with craft unions for recognition upon an equal footing. Their brief quotes from statements to this effect by several members of the House of Representatives and the Senate during hearings and debate on the PRA. Although such statements undoubtedly represent the personal views of the members, they could hardly be held to represent the views of the majority in each chamber in light of the clear and specific provision of section 1202 that the NLRB shall decide in each case the unit "appropriate" for collective bargaining in the Postal Service. Obviously, if a nonnational or noncraft union petitions the NLRB for an election in a unit that is determined by the NLRB to *not* be "appropriate," the union will not be able to compete. Congress did not see fit to define "appropriate," leaving that to the expertise of the NLRB, thus:

> It is the intent of the Conference Committee that these provisions of the conference substitute leave to the National Labor Relations Board the judgment as to what will be the appropriate units for collective bargaining in the Postal Service on the basis of the same criteria applied by the Board in determining appropriate bargaining units in the private sector. The conference substitute deems it desirable to leave the determination of appropriate bargaining units entirely in the

9. Review would occur upon a cease and desist order of the NLRB in which the record contains the NLRB's investigation and disposition of a representation petition. See Boire v. Greyhound Corp., 376 U.S. 473, 476-80, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964).

judgment of the NLRB rather than to predetermine such matters in any way. Conference Rep., H.R. Rep. No. 91–1363, 91st Cong., 2d Sess. 82 (1970).

[3] Appellants have not shown that the NLRB acted in excess of its power or contrary to the provisions of the NLRA, which would provide a basis for jurisdiction of the district court itself, although not for convening of a three-judge court. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). Nor have appellants been denied an opportunity for hearing or other due process right by the NLRB which also would give the district court jurisdiction. Fay v. Douds, 172 F.2d 720 (2d Cir. 1949); Lawrence Typographical Union v. McCulloch, 121 U.S.App.D.C. 269, 349 F.2d 704 (1965).

In view of the foregoing, we hold that the district court did not err in denying plaintiff-appellants' application for the convening of a three-judge court.

Summary Judgment Against Plaintiff-Appellants' Claim That They Were Deprived of Equal Protection of the Law by the PRA as Construed by the PMG

[4] The district court determined that appellants' constitutional challenge to the PMG's interpretation and application of Chapter 12 of the PRA was without merit. The court pointed out that constitutionality of the grant of exclusive representation to the national craft unions by section 10(a) of the PRA had been upheld in the *Blount* case. It held that, in recognizing the incumbency of the constitutionally-designated exclusive representatives, the PMG acted in a manner required by section 1203(a) of the PRA.[10] The court further held that the PMG, in continuing to accord exclusive representation status to the national craft unions after July 20, 1973, did not interfere with the right of collective bargaining of postal employees set forth in Chapter 12 of the PRA. On the contrary, the court said that the Postal Service was required to continue to recognize the craft unions by section 1203(a), because those unions were presumed to have been selected by a majority of the postal employees in appropriate units as their representatives.[11]

Appellants take issue with this presumption, arguing that "[s]ince the expiration of the transitional period *no* union has been 'selected' by a majority of postal workers as their bargaining representatives in any unit . . . ." However, this argument proceeds from misapprehending the opinion in *Blount* and Congressional design set forth in the PRA discussed earlier in this opinion. Moreover, as pointed out by appellee-PMG, section 1203(c)(1)(B) specifically contemplates that the Postal Service may recognize a labor organization that has not been certified in an election as the exclu-

10. The court noted that the procedures prescribed by Chapter 12 of the PRA were borrowed primarily from section 9 of the NLRA (29 U.S.C. § 159) and that the constitutionality of similar procedures had been established, citing NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938), and Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

11. The court observed that the Congressional grant of exclusive recognition to the national craft unions by section 10(a) of the PRA emanated from the selection of the unions under elections held pursuant to Presidential Executive Orders, note 2, *supra*.

POOR COPY

sive representative of postal workers by referring to "the labor organization which has been certified or is being currently recognized by the Postal Service."

Accordingly, we hold that the district court did not err in granting defendant-appellees' motion for summary judgment with respect to plaintiff-appellants' claim that they were denied equal protection of the law by the PRA as construed by the PMG.

Dismissal (for Lack of Jurisdiction) of Plaintiff-Appellants' Claims that the PMG Committed Unfair Labor Practices Under Section 8(a)(2) of the NLRA

The district court stated that it would not reach the merits of plaintiff-appellants' claim that continued recognition of the craft unions by the Postal Service constituted an unfair labor practice under section 8(a)(2) of the NLRA, because the court was without jurisdiction to review such a cause of action. It pointed out that the GCNLRB had considered this claim and had determined not to issue an unfair labor practice complaint; that this was a final, unreviewable decision, citing, among other cases, International Union of Operating Engineers v. International Union, 173 F.2d 557, 559 (8th Cir. 1949).

With respect to appellants' additional claim of an unfair labor practice by the Postal Service's execution in 1973 of the new, two-year national agreement during pendency of representation petitions before the NLRB, the district court stated that this was "inextricably bound up in the administrative remedies Plaintiffs have pursued before the Board . . . the agency with primary jurisdiction to pass thereon." Accordingly, it dismissed plaintiff-appellants' claim of an unfair labor practice for lack of jurisdiction.

[5] Although *International Union* did not involve a refusal by the GCNLRB to issue an unfair labor practice complaint, the court stated that section 10 of the Administrative Procedure Act (5 U.S.C. § 701 et seq.), upon which appellant relied, "is expressly inapplicable to the instant case, since the Board's action in calling for an election was by law committed to its discretion, was not subject to review, and was not final." (Footnote omitted.) In any event, it is well settled that the GCNLRB has unreviewable discretion to refuse to issue an unfair labor practice complaint. Vaca v. Sipes, 386 U.S. 171, 182, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Hourihan v. NLRB, 91 U.S. App.D.C. 316, 201 F.2d 187 (1952), cert. denied, 345 U.S. 930, 73 S.Ct. 792, 97 L.Ed. 1359 (1953).

[6] Appellants argue that where questions of statutory construction are involved—as opposed to findings of facts or making expert judgments on labor policies—courts will review refusals to issue unfair labor practice complaints, citing Southern California District Council v. Ordman, 318 F.Supp. 633 (C.D.Cal. 1970). We do not regard that case, which the court noted was not involved with the merits, as apposite. The NLRB's dismissal of this claim of appellants involved the factual determination of whether, as of the effective date of the PRA, the craft unions held national exclusive recognition rights which had been granted by the Post Office Department, as prescribed by section 10(a) of the PRA. Once that determination was made, the NLRB's decision was controlled by the *Blount* case, including the

court's interpretation of "transitional period."

Therefore, we hold that the district court properly dismissed plaintiff-appellants' unfair labor practice claims against the PMG for lack of jurisdiction.

The judgment of the district court is affirmed.

Appendix B

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES et al., Plaintiffs,

v.

E. T. KLASSEN, Individually and as Postmaster General of the United States, et al., Defendants,

and

National Association of Letter Carriers, AFL-CIO, Defendant-Intervenors.

Civ. A. No. 2143-73.

United States District Court, District of Columbia.

Jan. 22, 1974.

(Reported in 369 F.Supp. 747)

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

I. INTRODUCTION

Plaintiffs, a postal labor union[1/] and several individual postal workers, have brought suit in this Court against

1/ Plaintiff National Alliance of Postal and Federal Employees (Alliance) has approximately 40,000 postal workers in its membership.

the Postmaster General of the United States and the General Counsel of the National Labor Relations Board, hereinafter NLRB or Board, to enjoin the operation and enforcement of Sections 10(a) and 1202, 1203 of the Postal Reorganization Act of 1970, 39 U.S.C. §1201, et seq., as applied by the Postmaster General to confer exclusive recognition upon several national craft unions. The complaint also seeks a declaratory judgment to the effect that the statute as applied is unconstitutional, the statute did not authorize the Postmaster General and the craft unions to negotiate and execute the collective bargaining agreement of July, 1973, and the conduct of the Postmaster General and the craft unions in executing the July, 1973 bargaining agreement constituted an unfair labor practice pursuant to Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(2). Plaintiffs finally ask for a permanent injunction directing the Defendant Postmaster General to enforce the provisions of Section 8(a)(2) of the National Labor Relations Act (NLRA), supra. Plaintiffs assert that this Court has jurisdiction of the claims for relief stated in the Complaint by virtue of 28 U.S.C. §§1331, 1361 and 2201, and Title 11, D.C. Code §521. However, Plaintiffs have applied for the reconvening of the Three Judge District Court convened in National Postal Union v. Blount, 341 F. Supp. 370 (D.D.C. 1972) to hear their claims for relief. The convening of a Three Judge Court is sought pursuant to 28 U.S.C. §§2282 and 2284. Defendants have opposed both this

request and Plaintiffs' Motion for a Preliminary Injunction, and they have also moved for the dismissal of the Complaint or Summary Judgment.

The Court has before it Plaintiffs' application for the convocation of a Three Judge Court, their Motion for a Preliminary Injunction, Defendants' Opposition to the foregoing, and Defendant General Counsel's Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment. For the reasons set forth in this Memorandum Opinion, the Court will deny Plaintiffs' Motions and grant that of Defendant General Counsel in the following manner:

1. Partial Summary Judgment is granted against Plaintiffs' constitutional claim that Sections 1910(a), 1202 and 1203 of the Postal Reorganization Act were construed and applied by the Postmaster General to permit the exclusive representation of postal workers by the transitional bargaining representatives designated by Congress in Section 10(a) of the Act beyond the expiration of the transitional bargaining period and thereby denied Plaintiff union and the individual Plaintiffs the equal protection of the law;

2. Plaintiffs' claim that the Postmaster General's decision to accord exclusive recognition to certain craft unions pursuant to Chapter 12 of the Postal Reorganization Act, 39 U.S.C. §120, et seq., constituted an unfair labor practice under §8(a)(2) of the National Labor Relations Act, 29 U.S.C.

§158(a)(2), is dismissed with prejudice;

3. Plaintiffs' claim that the Postmaster General committed an unfair labor practice pursuant to §8(a)(2) of the NLRA, supra, by negotiating new collective bargaining agreements with national craft unions during the pendency of numerous representation petitions filed with the National Labor Relations Board in 1971 and 1973 is dismissed, without prejudice, to renew said claim at an appropriate future time and in the proper forum.

II. BACKGROUND

The Postal Reorganization Act of 1970, supra, creates the "United States Postal Service" as an "independent establishment of the executive branch" and sets forth a special body of law for the regulation of labor relations in the Postal Service. The Act confers upon postal employees a statutory right of collective bargaining and subjects the Postal Service, with certain modifications, to the provisions of the National Labor Relations Act, 39 U.S.C. §1209(a).

Plaintiffs challenge the operation, execution and enforcement of Chapter 12 of the Act, supra, as applied by Defendant Postmaster General when he voluntarily recognized five national craft unions as exclusive representatives of postal employees and proceeded to enter into collective bargaining agreements with them. Plaintiffs contend that the accordance of exclusive representations to the craft unions and the execution with them of a bargaining agreement effective

through August 1975 violates Plaintiffs' statutory rights of collective bargaining and denies them the equal protection of the law. Plaintiff labor organization contends that the Act affords it the right to compete with the craft unions through Board-held elections for the right to represent postal workers prior to the execution of a collective bargaining agreement such as that challenged here.

The Court is of the view that the Postmaster General's decision to accord majority representative status to the craft unions after expiration of the transitional bargaining period established in §10(a) of the Act had firm basis in the language of the Act and in the opinion of the Court in National Postal Union v. Blount, supra, which held the Act constitutional, 341 F. Supp. at 372-373. In Blount, the Court reviewed the two-stage congressional scheme for effecting the Postal Service transition from limited postal worker participation to comprehensive labor-management relations comparable to those in the private sector. Specifically, the Court declared the constitutionality of Section 10(a) of the Act which appointed seven postal craft unions as exclusive collective bargaining agents to represent 600,000 postal employees in labor relations matters during a specified "transitional bargaining period." In this regard, the Court made the following comment:

> "In the aftermath of a very serious postal workers strike, Congress built into the Act a transitional bargaining mechanism

> designed smoothly to incorporate with some modification the status quo in labor representation among the postal employees. While this may be open to criticism as an inaccurate reflection of the appropriate bargaining units, resolution of that question is reserved by the Act to the National Labor Relations Board." 341 F. Supp. at 373. (Emphasis added)

Upon completion of the transitional bargaining period, the permanent bargaining system begins pursuant to Chapter 12 of the Act, supra, wherein the question of appropriate bargaining units is expressly reserved to the Board. The statutory mandate is found in Sections 1202 and 1203 of the Act which in pertinent part read as follows:

> "Section 1202. Bargaining Units
> "The National Labor Relations Board shall decide in each case the unit appropriate for collective bargaining in the Postal Service.
>
> "Section 1203. Recognition of Labor Organizations
> "(a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

* * *

"(c) When a petition has been filed in accordance with such regulations as may be prescribed by the National Labor Relations Board--

"(1) by an employee, a group of employees, or any labor organization acting in their behalf, alleging that (A) a substantial number of employees with to be represented for collective bargaining by a labor organization and that the Postal Service declines to recognize such labor organization as the representative; or (B) the labor organization which has been certified or is being currently recognized by the Postal Service as the bargaining representative is no longer a representative; or

"(2) by the Postal Service, alleging that one or more labor organization has presented to it a claim to be recognized as the representative;

the National Labor Relations Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation exists, shall

> provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the National Labor Relations Board, who shall not make any recommendations with respect thereto. If the National Labor Relations Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Sections 1202 and 1203, which substantially duplicate corresponding provisions of Section 9 of the NLRA, 29 U.S.C. §159, authorize the NLRB in unambiguous terms to investigate properly filed petitions and to order elections or make such determinations as the Board finds necessary. Where a "question of representation" is found to exist, the Board must decide "the unit appropriate for collective bargaining." Thus the type, scope and composition of a bargaining unit of postal workers having substantial mutual interests in collective bargaining is to be determined by the Board, and will not be disturbed unless clearly arbitrary or unreasonable. NLRB v. White Construction & Engineering Co., Inc., 204 F.2d 950 (5th Cir. 1953). It is equally clear on the face of the statute that elections will be held only where the Board believes it propitious.

Plaintiff labor organization has availed itself of the procedures set forth

in Chapter 12 of the Act, supra, in an effort to obtain elections in various proposed units of Postal Service employees. In 1971, several locals of the Plaintiff Alliance group filed representation petitions with the Board. Although hearings were held in 1972, the Board has still not rendered a decision on these petitions. When the Postal Service and the national craft unions signatory to the transitional bargaining agreement executed the new agreement at issue here, Plaintiff union filed unfair labor practice charges in the NLRB's Baltimore Regional Office alleging that the Postal Service was in violation of Section 8(a)(2) and (5) of the NLRA, supra. These charges were, for the most part, dismissed by the Regional Director in October 1973. Left undecided were allegations that the Postal Service illegally executed a new bargaining agreement during the pendency of the aforementioned representation petitions. The Regional Director decided to hold this aspect of the §8(a)(2) charge in abeyance pending a decision by the Board with respect to the 1971 representation petitions. His action was affirmed on appeal by the Office of Appeals of the National Labor Relations Board on November 12, 1973.

III. JURISDICTION

From the foregoing, it seems clear that the constitutional challenge to the congressional designation of craft unions as exclusive representatives of postal workers denied by the Court in Blount, supra, and the unfair labor practice complaint against the Postmaster General

pending before the National Labor Relations Board are now being pursued in this Court. With this in mind, we have determined that the Court has jurisdiction under 28 U.S.C. §1331 to review Plaintiffs' constitutional allegations inasmuch as these charges require the Court to determine whether, in continuing to accord exclusive representation to the national craft unions beyond the expiration of the transitional bargaining period, the Postmaster General construed and applied Chapter 12 of the Postal Reorganization Act in a manner that denied Plaintiff union and the individual Plaintiffs the equal protection of the law.

However, the Court is without jurisdiction to consider whether the Postmaster General committed an unfair labor practice under Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(2), by continuing to accord the aforementioned continued recognition to craft unions since that question directly involves the Defendant General Counsel's final, non-reviewable statutory authority over the investigation and issuance of unfair labor practice complaints. Section 3(d) of the NLRA, 29 U.S.C. 153(d); see, Terminal Freight Co-op Assn. v. N.L.R.B., 447 F.2d 1099 (3rd Cir. 1971); Mayer v. Ordman, 391 F.2d 889 (6th Cir. 1968).

The Court is also without jurisdiction to review Plaintiffs' claim that the Postal Service violated the National Labor Relations Act by negotiating new collective bargaining agreement with the incumbent national craft unions during

the pendency of the representation petitions filed with the NLRB regional offices in 1971 and 1973. That precise issue has been taken under advisement by the National Labor Relations Board which has exclusive primary jurisdiction over such questions. The Board's consideration of this matter will not be interfered with by this Court.

IV. QUESTIONS PRESENTED

1. Whether Plaintiffs have raised substantial constitutional questions that are appropriate for resolution by a Three Judge Court pursuant to 28 U.S.C. §§ 2282, 2284?

2. Whether Defendant Postmaster General's interpretation and application of Chapter 12 of the Postal Reorganization Act to accord the craft unions exclusive recognition under Section 1203(a) of the Act without new unit determinations or elections renders the statute unconstitutional inasmuch as it allegedly intrudes upon the fundamental right of postal employees to choose their own bargaining representatives and is allegedly a form of discrimination in favor of craft unions that is not merely transitional, but initiates the permanent bargaining system without affording an opportunity for rival unions to compete with the incumbent craft unions?

V. DECISION

A. Plaintiffs Have Failed to State Adequate Grounds for Convening a Three Judge Court.

Plaintiffs have applied to this Court for the reconvening of the three-judge statutory court in National Postal Union, et al v. Blount, supra. As a basis for reconvening said Three-Judge Court pursuant to 28 U.S.C. §2282, 2284, Plaintiffs point out that Count I of their Complaint seeks to enjoin the enforcement, operation and execution of an Act of Congress, and that a Three Judge Court is required to grant such relief. However, it is the Court's conclusion upon close reading of the Complaint that Plaintiffs' constitutional allegations, in essence, are aimed at administrative action on the part of the Postmaster General and against prosecutorial inaction by the General Counsel. In light of the nature of the claims raised in the instant action, a Three Judge Court need not be constituted. William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 113-166 (2nd Cir.), cert. denied, 385 U.S. 898 (1966). Compare McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972). Notwithstanding the thrust of Plaintiffs' claims for relief, a Three Judge Court should not be convened where, as is the Court's finding here, the constitutional attack on the statute as applied is insubstantial. See, Ex Parte Poresky, 290 U.S. 30, 32.

B. The Postmaster General's Action in According Exclusive Recognition to the Craft Unions Pursuant to §1203(a) of the Postal Reorganization Act Was Not An Invidious Discrimination Against Plaintiff Union But Constituted a Valid Exercise of Constitutionally Delegated Authority.

The Court considers Plaintiffs' constitutional challenge to the Postmaster General's interpretation and application of Chapter 12 of the Postal Reorganization Act, 39 U.S.C. §1201, et seq., to be without merit. The Postmaster General's decision to continue to accord exclusive recognition to the craft unions beyond the transitional bargaining period has its basis in Section 10(a) of the Act where Congress granted seven national craft unions the right of exclusive bargaining representation of postal workers during the transitional bargaining period. This Congressional designation of the craft unions emanates from the selection of such unions as national exclusive bargaining representatives of postal workers under elections held pursuant to Presidential Executive Orders granting the right of representation and bargaining as prescribed in those Orders. Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962) and Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969). The grant of exclusive representation in §10(a) withstood constitutional challenge in National Postal Union v. Blount, 341 F. Supp. 370 (D.D.C. 1972), where the Court held that the Postal Reorganization Act, including Section 10(a), is

constitutional. That holding is undisturbed by the Postmaster General's action under challenge here. For in recognizing the incumbency of the constitutionally designated exclusive representatives, the Postal Service acted in a manner required by Section 1203(a), and the constitutionality of Section 1203(a) is beyond dispute.

Upon completion of the transitional bargaining period, the Act confers upon the postal employees a statutory right of collective bargaining set forth in Chapter 12 of the Act, supra. The Postmaster General did not interfere with the exercise of that right in continuing to accord majority representation status to the craft unions after July 20, 1973 when the transitional bargaining agreement expired. To the contrary, the Court finds that the Postal Service was required to accord exclusive recognition to the incumbent craft unions under Section 1203(a) of the Act, supra, since those unions were presumed to have been selected by a majority of the postal employees in appropriate units as their representatives. Plaintiff labor organization is understandably dissatisfied with the composition of the bargaining units at the time the new agreement was executed by the Postal Service and the incumbent unions. However, Plaintiff union's failure to benefit as quickly as it might like from the §1203 unit determination procedures conducted by the NLRB does not give rise to a substantial claim of invidious discrimination. Those procedures enacted by Congress in Chapter 12 of the Act were borrowed primarily from

Section 9 of the National Labor Relations Act, 29 U.S.C. §159, to afford outside unions the opportunity to compete with the craft unions and to provide postal employees with a means to choose bargaining representatives.

The constitutionality of those procedures is established by judicially accepted principles of law developed under Section 9 of the NLPA. See N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); N.L.R.B. v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941); cf. Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937).

It is important to recognize that Chapter 12 does not mandate Board action on representation petitions filed pursuant to §1203(c) of the Act by a date certain. Accordingly, there is no statutory requirement that a Board-held election precede the Postal Service's according exclusive recognition to a majority representative pursuant to §1203(a) of the Act, supra. Instead the Act sets forth well-conceived representation procedures for petitioning the NLRB to establish "appropriate bargaining units" and conduct representation elections to select bargaining representatives in certain units.

Plaintiffs contend that the constitutional validity of the Chapter 12 procedures must turn on whether the Act requires the Board to establish the permanent bargaining apparatus

contemplated by Chapter 12 by making unit determinations in the Postal Service and by holding elections in those units. This argument, for reasons not clear to the Court, presumes that outside unions and individual workers who seek to invoke the §1203(c) petition procedures will either be unable to "trigger" the instant procedure or will receive unfair treatment in the Board's efforts to group those employees having substantial mutual interest in appropriate bargaining units. Plaintiffs' claim here is simply without merit. As the Court in Blount emphasized, the very existence of the representation procedures set forth in §§1202 and 1203 of the Act redeems the Congressionally mandated transitional discrimination against outside unions in §10(a) of the Act by limiting in duration the designation of the craft unions as bargaining representatives to the point in time when petitions filed under Chapter 12 of the Act result in the dislodging of the incumbent craft unions. Thus, by providing outside unions with the ultimate opportunity to petition the National Labor Relations Board to establish appropriate bargaining units that will allow them to participate in representation elections and win accredited status as the certified bargaining representatives of certain units, the Act incorporates concepts of political democracy into Postal Service labor relations and thereby precludes discrimination of a kind Plaintiffs suggest in the workers' selection of their collective bargaining representatives. As long as the Postal Service acts within the scope of its authority

granted in Chapter 12 of the Act, as it has done here, and the representation opportunities provided in Chapter 12 are preserved, the Act is beyond constitutional challenge.

The Court notes in passing that in the absence of a Board-held election or the successful rebuttal of a bargaining representative's majority status, the Postal Service is constrained under §1203(a) of the Act to continue to recognize the incumbent majority representative of the postal employees in an appropriate bargaining unit. 39 U.S.C. §1203(a). Indeed, it is a well-settled labor law rule in the private sector that an employer's refusal to bargain with the recognized majority representative may constitute an unfair labor practice under Section 8(a)(5) of the NLRA, supra.

As stated in Part III of this Opinion, the Court will not reach the merits of Plaintiffs' claim that the Postal Service's continued recognition of the craft unions constitutes an unfair labor practice pursuant to §8(a)(2) of the NLRA, 29 U.S.C. §158(a)(2), because the Court is without jurisdiction to review such a cause of action. The NLRB has considered this question and, in a final, unreviewable decision, made the determination not to issue an unfair labor practice complaint. See Exhibit A to Plaintiffs' Complaint; see also International Union v. International Union, 173 F.2d 557, 559 (8th Cir. 1949); Terminal Freight Co-op Assn. v. N.L.R.B., 447 F.2d 1099, 1102 (C.A. 3, 1971); Wellington Mill Div., West Point Mfg. Co. v. N.L.R.B.,

330 F.2d 579, 590 (C.A. 4, 1964), cert. denied, 279 U.S. 882; Contractor's Ass'n of Phila., et al v. N.L.R.B., 295 F.2d 526 (C.A. 3, 1961), cert. denied, 369 U.S. 813.

VI. CONCLUSION

The Court has concluded that the Postal Service's continued recognition of the incumbent craft unions as majority representatives of certain units of postal employees is consistent with well-settled principles of labor law requiring the employer to bargain with the majority representative of his workers. The Postal Service's action in this regard was contemplated by Chapter 12 of the Postal Reorganization Act of 1970 and in no way disturbs the constitutionality of the statute as upheld by the Court in National Postal Union v. Blount, supra.

The National Labor Relations Board is presently reviewing representation petitions filed by locals of Plaintiff labor organization pursuant to §1203(c) of the Act and will ultimately determine whether unit determinations and secret elections as provided for in the Act are appropriate to the situation at hand. Plaintiffs' remaining federal questions, which concern the unfair labor practice dimension to the Postal Service's continued recognition of the incumbent craft unions and its execution of the new bargaining agreement with these representatives, are inextricably bound up in the administrative remedies Plaintiffs have pursued before the Board. Thus it would be premature for this or any court to

review allegedly objectionable administrative action which has not yet been ruled upon by the agency with primary jurisdiction to pass thereon.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

Appendix C

SUPREME COURT OF THE UNITED STATES

No. A-213

NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES, ET AL.,

Petitioners

V.

E. T. KLASSEN, Individually and as Postmaster General of the United States, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 22, 1975.

/S/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 9th day of September, 1975.

Appendix D

STATUTORY PROVISIONS INVOLVED

(1) Pertinent sections of the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719, 733, 39 U.S.C. §101 et seq. (1970):

> Sec. 10. (a) As soon as practicable after the enactment of this Act, the Postmaster General and the labor organizations which as of the effective date of this section hold national exclusive recognition rights granted by the Post Office Department, shall negotiate an agreement or agreements covering wages, hours, and working conditions of the employees represented by such labor organizations. The parties shall commence bargaining for such agreement or agreements not later than 30 days following delivery of a written request therefor by a labor organization to the Postmaster General or by the Postmaster General to a labor organization. Any agreement made pursuant to this section shall continue in force after the commencement of operations of the United States Postal Service in the same manner and to the same extent as if entered into between the Postal Service and recognized collective-bargaining representatives under chapter 12 of title 39, United States Code.
>
> §1202. Bargaining Units
>
> The National Labor Relations Board shall decide in each case the unit appropriate for collective bargaining

in the Postal Service. . . .

* * *

§1203. Recognition of Labor Organizations

(a) The Postal Service shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative.

(b) Agreements and supplements in effect on the date of enactment of this section covering employees in the former Post Office Department shall continue to be recognized by the Postal Service until altered or amended pursuant to law.

(c) When a petition has been filed, in accordance with such regulations as may be prescribed by the National Labor Relations Board--

(1) by an employee, a group of employees, or any labor organization acting in their behalf, alleging that (A) a substantial number of employees wish to be represented for collective bargaining by a labor organization and that the Postal Service declines to recognize such labor organization as the representative; or (B) the labor organization which has been certified or is being currently recognized by the Postal Service as the bargaining representative is no longer a representative; or

(2) by the Postal Service, alleging that one or more labor organizations has presented to it a claim to be recognized as the

representative;
the National Labor Relations Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation exists, shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the National Labor Relations Board, who shall not make any recommendations with respect thereto. If the National Labor Relations Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(d) A petition filed under subsection (c)(1) of this section shall be accompanied by a statement signed by at least 30 percent of the employees in the appropriate unit stating that they desire that an election be conducted for either of the purposes set forth in such subsection.

(e) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the National Labor Relations Board.

(2) Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §158(a)(1970) provides:

(a) It shall be an unfair labor practice for an employer--

* * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * *